- Ex Parte communication prohibited
- Motion to set aside judgment pursuant to Rule 9024
- attorney-Drafted Orders.
Rule 60(b) to amend prior order

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

In the matter of:	
THE COLONY PLACE COMPANY	Chapter 7 Case
Debtor	Number 88-10819
DORIS B. HARRISON	
Movant	
v.	
BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION and JAMES D. WALKER, JR., TRUSTEE	
Respondents	

FILED
at 2 O'clock & 51 min. PM
Date 4/4/90
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

MEMORANDUM AND ORDER
ON MOTION TO SET ASIDE JUDGMENT

Doris B. Harrison filed a Motion to Set Aside the Judgment of the Honorable John S. Dalis, United States Bankruptcy Judge, dated November 30, 1989, pursuant to Bankruptcy Rule 9024, said Motion having been filed on February 8, 1990. By Order dated February 21, 1990, Judge Dalis recused himself and the matter was

assigned to me. A hearing was conducted in Augusta, Georgia, on February 28, 1990, and after consideration of the evidence introduced at that hearing, together with applicable authorities and the argument of counsel, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Ms. Harrison's Motion asserts that under Bankruptcy Rule 9024, which adopts F.R.C.P. 60, the judgment should be set aside. Subsection (b)(3) of Rule 60 provides:

> On motion and such terms as are just the court may relieve a party . . . from a final . . . order . . . for the following reasons:
>
> (3) Fraud . . . misrepresentation or other misconduct of an adverse party.

The rule goes on to provide that such a motion shall be made within a reasonable time and not more than one year after the order was entered.

The specific misconduct alleged in Ms. Harrison's motion is that "an attorney for Bankers First Federal Savings and Loan

Association intentionally communicated ex parte with the Court concerning this case in violation of Bankruptcy Rule 9003." From the evidence adduced at the hearing and taking judicial notice of certain documents in this Court's file, the history of the case is as follows:

On August 24, 1989, James D. Walker, Jr., Trustee in this case, filed an Application to Compromise a Controversy between the Debtor corporation and Bankers First Federal Savings and Loan Association ("Bankers First"). The terms of the proposed compromise were set forth in a notice to creditors and other parties in interest issued by the Clerk of this Court on August 29, 1989, which set a hearing to consider the application for September 18, 1989, at 9:00 o'clock a.m.

This controversy had been the subject of a previous application by the Trustee for approval of compromise filed January 17, 1989, scheduled for hearing on July 5, 1989. At that time an objection was interposed to the proposed compromise by Doris B. Harrison, a shareholder of the Debtor corporation. Appearing at the hearing on July 5th in addition to Ms. Harrison was D. Landrum Harrison who attempted to enter an appearance in opposition to the proposed compromise on behalf of Landor Condominium Consultants, Inc. Judge Dalis ruled that Mr. Harrison, a former attorney, could

not enter an appearance on behalf of the corporation. At the request of the Trustee, the matter was continued to July 10, 1989, so that expert testimony regarding valuation of the real estate, the subject of the compromise, could be procured. On July 17, 1989, Doris B. Harrison filed a motion asking the Court to order the Trustee to abandon a certain pending civil action asserted by Doris B. Harrison and Landor Condominium Consultants, Inc., in the Superior Court of Richmond County, denominated as Civil Action Number 89-RCCV-327, and captioned: Landor Condominium Consultants, Inc., and Doris B. Harrison, in her capacity as a shareholder of The Colony Place Company v. Bankers First Federal Savings and Loan Association, et al. Apparently the Trustee did not pursue the initial application to compromise controversy but, instead, filed a second Application to Compromise on August 24, 1989. On August 28, 1989, the Trustee filed an objection to the motion of Doris B. Harrison which sought to compel the Trustee to abandon the aforementioned cause of action. Objections to Ms. Harrison's Motion to Compel Abandonment were also filed on behalf of Smith Brothers Mechanical Contractors, David Roper, and Harold Fowler, all parties in interest in the proceeding.

A hearing to consider the Trustee's second application to compromise controversy and a hearing on Ms. Harrison's Motion to Compel Abandonment of the Superior Court civil litigation were

scheduled for the same date and time. On September 14, 1989, an objection to the Trustee's second application to compromise was filed by The Colony Place Company (the Debtor) and joined in by Doris B. Harrison, Richard R. Bird, Annemarie S. Bird, James C. Harrison, III, and Marie W. Harrison. That pleading was signed by Doris B. Harrison, Richard R. Bird, Annemarie S. Bird, and by D. L. Harrison "as attorney in fact for James C. Harrison, III, and Marie W. Harrison." The objection was not signed by an attorney for the Debtor corporation.

Indeed, on September 13, 1989, J. Patrick Claiborne, attorney for the Debtor, had filed a motion to withdraw as counsel. The motion asserted that the Debtor had five shareholders and at the time Claiborne was retained to represent the Debtor "there existed and still exists today a strong division among the shareholders as to what constituted the best interest of the corporation and what action the corporation should take." The motion to withdraw went on to set forth that Movant Claiborne had been hired to represent the Debtor corporation by Harold Fowler who had been elected president with the support of 60% of the shareholders. The motion went on to state:

> Bankers First is a creditor of the debtor and of the individual shareholders. There exists among the shareholders apparent irreconcilable differences as to how to deal

> with Bankers First claims against the corporation and the individual shareholders. In addition Fowler and Roper [two of the shareholders] believe that Harrison and his wife [a shareholder] have misappropriated assets of the debtor and that a turnover action should be prosecuted. The Trustee has instituted and is presently maintaining a turnover proceeding against Harrison and his wife to recover said assets.

The motion further states that just prior to the filing of the motion to withdraw, Harrison had notified Claiborne that Harrison had been elected by the shareholders to replace Fowler as president. Claiborne had also been advised by the Chapter 7 Trustee, James D. Walker, Jr., that he did not intend to retain Mr. Claiborne to represent the Debtor in continuing proceedings in this bankruptcy case. Mr. Claiborne concluded that inasmuch as the Trustee had been placed in control of the Debtor corporation's affairs, Claiborne no longer had standing to represent Debtor in this matter. He also felt and so informed Mr. and Mrs. Harrison that due to the conflict among the shareholders, he believed any effort to continue to represent the Debtor would constitute a conflict of interest on his part. Claiborne showed that he had obtained an informal advisory opinion from the Office of General Counsel of the State Bar of Georgia which was supportive of his conclusion and prayed that the Court permit him to withdraw as attorney of record for the Debtor.

On September 15, 1989, Judge Dalis signed an Order granting the Motion to Withdraw, finding that the Trustee had not retained Mr. Claiborne, that Mr. Claiborne no longer had any duty to represent the Debtor, that shareholders with objections to any acts of the Trustee could secure independent counsel to protect their interests, and that Mr. Claiborne's duty of representation extended only to the Debtor corporation and not to the individual shareholders. Also on September 15, 1989, Judge Dalis entered an Order striking from the record "all pleadings (pleadings No. 69) filed by D. Landrum Harrison as representative for Landor Condominium Consultants, Inc." The basis for this Order was that "corporate entities cannot appear and plead matters 'pro se' and may only proceed through an attorney authorized to practice in this court . . . . As Mr. Harrison is not an attorney licensed to practice before this court he may not file pleadings and represent his employer in this proceeding."

In a third order dated September 15, 1989, Judge Dalis ruled on a procedural matter with respect to the objection to compromise filed by The Colony Place Company, Doris B. Harrison, Richard R. Bird, Annemarie S. Bird, James C. Harrison, III, and Marie W. Harrison. Judge Dalis found that the objection of The Colony Place Company was not signed by an attorney representing the corporation as required by Bankruptcy Rule 9011 and said objection

was stricken. With respect to Doris Harrison, Richard Bird and Annemarie Bird, Judge Dalis found that the objections were executed pro se and that they would be permitted to proceed with their objection. However, with respect to James C. Harrison, III, and Marie W. Harrison, he found that the objection was signed by D. Landrum Harrison as "attorney in fact". Judge Dalis ruled that James and Marie Harrison could appear pro se or through an attorney but could not utilize the services of an attorney in fact, finding that the preparation and filing of the pleading constituted acts of a legal character and thus could not be handled by a mere attorney in fact but would have to be handled by one authorized to practice law. He ruled that the appearance by D. Landrum Harrison as attorney in fact "is nothing more than an attempt by this individual not licensed to practice before this court to appear and plead on behalf of another as if he were an attorney." Judge Dalis ruled that D. Landrum Harrison could not appear and plead on behalf of James and Marie Harrison but that they could proceed pro se or through a licensed attorney. Judge Dalis also pointed out that this pleading constituted the third attempt by D. Landrum Harrison to file pleadings and appear in this case in a representative capacity and stated:

> Any additional attempt by D. Landrum Harrison to file pleadings and appear on behalf of another entity in this or any related proceeding in this court can only

be construed as an act calculated to hinder or obstruct this court in the administration of justice and must be dealt with accordingly. See, 18 U.S.C. §401 and Bankruptcy Rule 9020.

The combined hearing on the Trustee's Application to Compromise the Controversy and on the Motion to Compel the Trustee to Abandon the Cause of Action against Bankers First was the subject of a lengthy hearing before Judge Dalis on September 18, 1989, in Augusta, Georgia. There were a number of appearances, including the pro se appearance of Doris B. Harrison and Richard R. Bird. However, there was no appearance at that hearing by or on behalf of Annemarie S. Bird, James C. Harrison, III, or Marie W. Harrison. Moreover, there was no appearance by or on behalf of Landor Condominium Consultants, Inc., the co-plaintiff with Mrs. Harrison in the Superior Court litigation against Bankers First. The evidentiary hearing was lengthy and the exhibits introduced for consideration by the Court were, to say the least, voluminous. D. Landrum Harrison was called as a witness by Mrs. Harrison to testify in support of her objection to the Trustee's application. He testified at length and was subjected to cross examination, as were a number of other witnesses. At the conclusion of the hearing Judge Dalis took the matter under advisement.

On October 2, 1989, Judge Dalis addressed a letter to

Doris Harrison and David Hudson, attorney for Bankers First, requesting each of them to submit proposed findings of fact and conclusions of law supporting their respective positions on the Trustee's application to compromise and setting a deadline of October 27th for the submission of such proposals. He forwarded a copy of his letter to all other parties who had appeared on September 18th at the hearing affording them the same opportunity (Exhibit P-1).

On October 27, 1989, two letters in reference to this matter were forwarded from the offices of Hull, Towill, Norman and Barrett. One was written by Mark S. Burgreen to D. Landrum Harrison, Doris Bird Harrison and Landor Condominium Consultants, Inc., and included a copy of the proposed order which the letter recited had been delivered to Judge Dalis on the same date (Exhibit P-3). The second letter, written by Lawton Jordan, Jr., to Judge, Dalis reflected that the proposed findings of fact, conclusions of law, and order were transmitted to him by hand delivery. The letter went on to state the following:

> We are providing opposing parties with a copy of this proposed order.
>
> For your convenience, we are enclosing marked copies of the material referred to. Because the record in this case is so massive, this may be of assistance to you. We are also enclosing copies of the

authorities cited in this draft. (Exhibit P-2)

In a subsequent paragraph of the letter, Mr. Jordan explains the manner in which references to the record of the trial are set forth in the proposed order. For example, he stated that references to the deposition of D. Landrum Harrison were made by simply using Mr. Harrison's initials, DLH, followed by the specific portion of the transcript where the testimony referred to appears (Exhibit P-2). Mr. Jordan's October 27th letter to Judge Dalis indicates service on certain parties but does not reveal that a copy was forwarded to Mrs. Harrison, Mr. Harrison, or Landor. Doris Harrison filed her proposed findings of fact and conclusions of law on October 27, 1989. The document she filed in the court did not, however, indicate whether she had served opposing parties and by letter dated November 2, 1989, Judge Dalis addressed a letter to her requiring her to do so or to certify that she had previously done so by November 13, 1989 (Exhibit P-5). On November 6, 1989, Doris Harrison responded to Judge Dalis by stating that on November 6th she served her proposed order on Lawton Jordon and that she had served the Trustee, Mr. Walker, on October 31st.

On November 30, 1989, Judge Dalis signed an order granting the Trustee's Application to Approve the Compromise and

denying "the motion of Doris B. Harrison and Landor Condominium Consultants, Inc., to require the Trustee to abandon the claims against Bankers First."

On December 15, 1989, Doris B. Harrison filed a Motion to Amend Findings and Judgment. That motion was denied as not being timely filed pursuant to Bankruptcy Rule 7052 by order of Judge Dalis dated December 20, 1989. On December 22, 1989, Doris B. Harrison filed a motion for reconsideration of Judge Dalis' December 20th denial of her motion based upon a former version of Bankruptcy Rule 7052 which, if still effective, would have resulted in the original motion to alter or amend being timely filed. However, because of an amendment to Bankruptcy Rule 7052 effective August 1, 1989, the original motion of Doris B. Harrison to alter or amend was not, in fact, timely filed and Judge Dalis so ruled by order dated December 27, 1989.

On February 8, 1990, Doris B. Harrison filed the Motion to Set Side Judgment which is the subject of this hearing, alleging that as a result of an intentional ex parte communication by attorneys for Bankers First with Judge Dalis in violation of Bankruptcy Rule 9003, the Court was "induced to err in the following particulars", setting forth thirty-one separate enumerations of error which are virtually the same if not identical to the grounds

set forth in Doris Harrison's untimely motion to amend filed on December 15, 1989.

At the hearing held on February 28, 1990, before the undersigned, appearances were entered by David Hudson, Lawton Jordan and Mark Burgreen, attorneys for Bankers First, by Doris Harrison pro se, by James D. Walker, Jr., the Trustee, and by D. Landrum Harrison. The status by which Mr. Harrison sought to appear at that hearing was initially unclear to the Court. Based on Judge Dalis' prior rulings that he could not appear on behalf of another party I sought clarification of his status whereupon Mr. Harrison exhibited an assignment of the claim of Landor Condominium Consultants, Inc., to D. Landrum Harrison in his individual capacity and an order of this court substituting him as a creditor in his individual capacity. I had serious reservations about the fortuitous timing of this assignment and the potential it carried that Judge Dalis' orders concerning Mr. Harrison's repeated attempts to involve himself in a representative capacity in this case were being circumvented. However, out of an abundance of caution, and in order to insure that all parties with a colorable right to be heard were afforded that opportunity I permitted Mr. Harrison to appear in support of Mrs. Harrison's motion. I made no determination as to whether by Landor's failure to appear at the September 18, 1989, hearing it and its assigns might lack standing

to appear in this proceeding. Moreover, because there was no further objection to Mr. Harrison's appearance by any party in interest there was no inquiry in the bona fides of the assignment by virtue of which Mr. Harrison sought to appear and participate.

The evidence submitted at the hearing before me on February 28th was essentially uncontradicted, although the legal conclusions the parties seek to draw from that evidence are very much in issue and very hotly disputed. Essentially three members of the firm of Hull, Towill, Norman and Barrett, collaborated on the proposed order submitted to Judge Dalis under cover letter dated October 27, 1989. It is uncontradicted that the letter from Lawton Jordan (Exhibit P-2) to Judge Dalis was not copied to Doris Harrison. It is also uncontradicted, however, that a copy of the proposed order forwarded to Judge Dalis by Mr. Jordan was timely sent to Mrs. Harrison as an attachment to the letter of Mark Burgreen (Exhibit P-3). It is further uncontradicted that certain attachments were enclosed in the package delivered to Judge Dalis along with Lawton Jordan's letter which were not included in the package sent to Mrs. Harrison.

From a reading of Mr. Jordan's October 27, 1989, letter it appears that the only attachments were copies of case law and excerpts of the record from the hearing relied upon by Bankers First

in its proposed order. Indeed, the testimony of David Hudson and Lawton Jordan stands uncontradicted that, in fact, the only attachments to the letter and proposed order were those items. According to Hudson's testimony, in each instance where a portion of the transcript of the trial or a portion of a deposition introduced at trial was referred to in the findings of fact or conclusions of law submitted by Bankers First, a copy of the page or pages referred to in the proposed order was attached as a convenience to allow the Court to verify the accuracy of the proposed finding without having to dig through the voluminous record. Likewise, the case authorities copied and attached to the proposed order were those cases cited in the proposed conclusions of law, again, as a convenience to the Court.

It is further uncontradicted that no material was supplied to Judge Dalis other than the record excerpts and copies of cases which were cited in the proposed order. It is further uncontradicted that all of the material cited in the proposed order, copies of which were provided to the Court, were accessible to Mrs. Harrison and all other parties in interest. This was true because the materials were excerpts from the record of the trial which were "available in the Clerk's Office" as set forth in Judge Dalis' October 27th letter (Exhibit P-1) and/or because they were already a part of the opposing party's individual files or because they were

accessible in a law library. It is also uncontradicted that there was no other communication, written or verbal, between any party in interest and Judge Dalis, with exception of the letters and attachments set forth above.

Neither Doris Harrison nor any party in interest learned of the contents of Lawton Jordan's letter to Judge Dalis of October 27, 1989, until after the deadline for filing a motion to alter or amend had run, sometime after December 15, 1989. This letter was apparently discovered during either Mrs. or Mr. Harrison's examination of the Court file at that time although Jordan's letter to Judge Dalis had been on file in the Clerk's Office since October 27, 1989. The record was unclear whether either the cases provided to Judge Dalis or the excerpts of the record may have been highlighted with yellow magic marker or in some similar fashion. All the attorneys called for cross examination, Messrs. Jordan, Hudson and Burgreen, lacked independent recollection as to whether that had been done, but they did indicate that they would not be surprised if highlighting had occurred. The original transcript of the evidence from the September 18th hearing was filed in the Clerk's Office on October 27, 1989, and had not been opened as of the date of the hearing. However, during my consideration of this matter on March 2, 1990, I opened the envelope in which that transcript was contained for the purposes of reviewing same.

CONCLUSIONS OF LAW

Before the Court is a decision which touches some of the most fundamental concepts undergirding the integrity of the judicial system. They are the concepts of equal access to justice, the requirement of procedural due process and the admonition that judicial processes must not only be fair but have the appearance of total fairness and impartiality. The motion to set aside judgment is based on Bankruptcy Rule 9003 which contains a general prohibition of ex parte contact between litigants and the Court and reads in relevant part:

> Except as otherwise permitted by applicable law, any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

Bankruptcy Rule 9003 is closely related to a number of provisions in the Code of Conduct for Judicial Officers and the Code of Professional Responsibility governing attorneys' conduct. For example the Code of Conduct for United States Judges, Canon 3(A)(4) provides in relevant part:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyers, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding.

Canon 7 of the ABA Model Code of Professional Responsibility provides:

> A lawyer should represent a client zealously within the bounds of the law.

EC7-35 provides in relevant part:

> . . . Generally, in an adversary proceeding a lawyer should not communicate with the judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or gives the appearance of granting undue advantage to one party.

State Bar of Georgia Standard 60 provides in relevant part:

> In an adversary proceeding, a lawyer shall not initiate communication, or cause another to initiate communication, as to the merits of the cause with the judge or an official before whom the proceeding is

pending . . .

with certain exceptions which are not relevant here.

In the context of these rules I hold that the issue presented for consideration involves a two-part inquiry. First, was there a prohibited ex parte communication from counsel to the Court? Second, if such a prohibited communication occurred what is the appropriate remedy?

It is clear from the above provisions that neither the Bankruptcy Rule, the Code of Conduct for Judges, nor the State Bar Standards applicable to attorneys' conduct prohibit all communications between counsel and the Court. In each of the provisions there is language which makes it clear that the communication must be on the merits of the case, or have an affect on the outcome of the Court's decision, or must give the appearance of granting undue influence or advantage to one party over another.

The case most closely in point uncovered by this Court's research, and one which is relied upon by both of the parties to the dispute before me, is the Eleventh Circuit decision In re Colony Square Company, 819 F.2d 272 (11th Cir. 1987). Although the decision is not factually on point in all respects, the case dealt

with a "ghostwritten opinion" which was solicited by the trial judge from the attorney for the prevailing side in a dispute which the judge had heard. When the ghostwritten opinion was solicited from the attorney, no notice to the adverse party was given. However, the court had already made a firm decision as to what its ruling would be and directed counsel to draft an order in a manner consistent with the court's theory of the case.

In Colony Square, the Eleventh Circuit was critical of the trial court's soliciting an opinion without notice to opposing counsel. The court was generally critical of the practice of trial courts permitting the litigants to draft opinions even when notice was given. Notwithstanding the Court's clear preference and belief that the better practice is for trial judges to draft their own opinions and at the very least to solicit draft orders from parties only with notice to the other side, the court refused to set aside the trial court's judgment, finding that the complaining party had failed to show that the process by which the judge arrived at his decision was fundamentally unfair. Colony at 276; In re Dixie Broadcasting, Inc., 871 F.2d 1023 (11th Cir. 1989). Although not stated in these terms, the court emphasized the fact that the trial court in Colony Square had already reached a firm decision prior to soliciting the opinion to be drafted by prevailing counsel. Thus, I find implicit in its decision the recognition that an ex parte

communication is not per se prohibited and does not per se require the reversal of a decision unless the communication is on the merits of the case and affects the outcome. This, of course, is consistent with my interpretation of the prohibition set forth in Bankruptcy Rule 9003.

In the case at bar, Court solicited proposed findings of fact and conclusions of law from both interested parties and notice of same was given. The question is whether Colony Square or other applicable authority would require the setting aside of a judgment when, in response to the Court's solicitation, one of the parties failed to serve the opposing side with all of the attachments that were sent to the court with its proposed order, when those attachments consisted only of excerpts from the record of the matter which the court itself had heard and copies of cases on which the proposed order relied, and when all the material was accessible to all parties.

Having considered the evidence, argument of counsel and applicable authorities, I conclude that there was no prohibited ex parte communication in this case. Although counsel for Bankers First acknowledged, and I totally agree, that it would be better practice to have all attachments that were provided to the Court sent to opposing parties as well, I agree with the position of

Bankers First that the act of providing the Court with courtesy copies of excerpts of the record of a proceeding that was tried before the judge to whom the proposed order has been submitted is not improper. The excerpts permitted to the Court to cross-reference the proposed order to the record without having to dig through hundreds of pages of documentary evidence and transcripts of testimony. When the attachments sent to the Court contain no information which is not specifically referenced in the order itself and when that order was duly served on opposing parties, there has been no showing that a communication occurred between counsel and the court which in the language of Rule 9003, affected the outcome of the case.

Bankers First's argument was fully set forth in its order for all to see and the attachments did not amount to a further communication. Although the excerpts which were provided to the judge addressed themselves, literally speaking, to the merits, they were merely supportive of the argument on the merits which the moving party made within the confines of its proposed order. The excerpts referenced in the order and attached to it for the Court's perusal were pieces of evidence and portions of testimony which had been introduced in open Court in the presence of the opposing party and the documents and transcripts to which the order and the excerpts related were fully accessible at all times to the opposing

party. Nothing extra was communicated to Judge Dalis in those attachments which was not disclosed in the proposed order to all parties. Thus I conclude that no prohibited ex parte communication occurred.

Alternatively, even if the communication is construed as the type of ex parte communication which is prohibited by Bankruptcy Rule 9003 and other applicable provisions, the Movant has failed to prove its entitlement to relief under Bankruptcy Rule 9024. As previously indicated, Colony Square establishes a rule that the moving party must show that the process was "fundamentally unfair." Likewise, the remedy provided in Bankruptcy Rule 9024 which incorporates Federal Rule of Civil Procedure 60(b)(3) is an extraordinary remedy and is not an appropriate substitute for direct appeal. In re Design Classics, Inc., 788 F.2d 1384 (8th Cir. 1986); Tucker v. Commonwealth Land Title Ins. Co., 800 F.2d 1054 (11th Cir. 1986). The burden of showing the applicability of this section is on the Movant.

I find the Movant has failed to prove that such an extraordinary remedy should be afforded since the moving party has utterly failed to demonstrate any lack of due process or fundamental unfairness in the process. Therefore, even if the communication is construed as the type of ex parte communication which is prohibited

by Bankruptcy Rule 9003 et al, the Movant has failed to prove its entitlement to the relief under Bankruptcy Rule 9024. There was absolutely no evidence presented at the hearing or otherwise in the record which would support a conclusion that Judge Dalis' consideration of this additional material in any way affected him in reaching the conclusions and entering the judgment which he reached.

The fact that there is alleged to be evidence in the record that conflicts with some of Judge Dalis' findings is hardly surprising and not probative of any error on his part. In any contested matter, and certainly one as aggressively litigated as this one, there will be conflicting evidence. The judge's role is to enter rulings after weighing that conflicting evidence. Judge Dalis did so and decided the matter adversely to Movants. In doing so he necessarily had to conclude that the preponderance of the evidence was on the side urged by the Trustee - not that there was no evidence to support Movant's position, merely that it was insufficient to overcome the Trustee's showing. Likewise, other allegations of error on Judge Dalis' part are unsupported in the record. Some of the alleged errors are purely technical in nature; others argue that the law was misapplied - however, none of the alleged error was shown to have been induced by the acts of opposing counsel which are in issue here. As Movant failed to introduce any

evidence that the acts of opposing counsel induced the Court to err or to rule in a manner that was procedurally unfair, the Motion is denied on this alternative ground.

I feel further compelled to observe that Movant misapprehends the scope of the Trustee's duties in questions relating to the settlement of disputes and the role of the Court in approving or disapproving a proposed settlement.

9 Collier on Bankruptcy §9019.03 at 9019-4-5 (15th Ed. 1990) provides:

> [M]ost circuit courts that have considered the issue have adopted a uniform standard by which the bankruptcy judge or other trial officer should be governed in the hearing on a motion to approve a compromise. According to these cases, the court should consider:
>
> (a) The probability of success in the litigation;
>
> (b) the difficulties, if any, to be encountered in the matter of collection;
>
> (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;
>
> (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

> . . . . The decision of the bankruptcy judge as to the approval or disapproval of a compromise agreement rests in the judge's sound discretion. Such a decision . . . will normally not be set aside except where there is an abuse of discretion.

See Protective Committee Stockholders of TMT Trailer Ferry, Inc., v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 202 L.Ed. 2d 425, (1968).

A trustee in reorganization has discretion to exercise business judgment in the operation of the debtor's business akin to the discretionary authority to exercise business judgment given to officers or directors of a corporation. In re Holiday Isles, Ltd., 29 B.R. 827 (Bankr. S.D. Fla. 1983). The bankruptcy judge's responsibility is not to decide numerous questions of law and fact raised by the parties in a settlement approval proceeding, but rather, to canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness. In re Heissinger Resources, Ltd., 67 B.R. 378 (C.D.Ill. 1986). The Trustee has general discretionary authority to pursue a cause of action or, in its best judgment, to compromise, settle or abandon legal claims. In re American Energy, Inc., 49 B.R. 420 (Bankr. N.D. 1985). The court will not interfere with the Trustee's decision, where a business judgment is made in good faith, upon reasonable basis and within the Trustee's authority under the Bankruptcy Code.

In re Curlew Valley Associates, 14 B.R. 506 (Bankr. D.Utah 1981). Inasmuch as I find that the Trustee's decision to compromise the Bankers First claim was within his authority under Bankruptcy Rule 9019 and was made after a good faith consideration of many competing considerations it cannot be said that there was any abuse of discretion manifest in Judge Dalis' ruling. Thus, the Motion is denied on this third alternative ground.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Movant's Motion to Set Aside Judgment is denied.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 4th day of April, 1990.